In the High Court of Judicature at Madras

Dated:10.08.2007

Coram

The Honourable Mr.Justice P.JYOTHIMANI

Appeal Suit No.768 of 1985 and 974 of 1986
and CMP.Nos.1559 and 1623 of 1998

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A.S.No.768 of 1985:

1. K.S.Ramanathan (died)
2. R. Ramamurthi ..Appellant

R2 in AS.768/85 tranposed as 2nd Appellant as LR of the deceases sole Appellant as per order of court dated 6.9.96 in CMP.11380/95.

..vs..

1. R.Jayaraman
2. R.Seetharaman
3. Janaki
4. Mohammed Sheriff Rowther
5. Vasantha
6. K.Manoharan
7. Ganesan ..Respondents

A.S.No.974 of 1986:

1.R. Ramamoorthi
2.Vasantha .. Appellants

vs.

1. R.Jayaraman
2. K.S. Ramanathan (died)
3. R.Seetharaman
4. Janaki
5. Mohammed Sheriff Rowther
6. K.Manoharan
7. Ganesan .. Respondents

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Appeal Suits filed under Section 96 of Civil Procedure Code against the judgement and decree dated 24.07.1985 made in O.S.No.20 of 1982 on the file of Subordinate Judge, Pattukottai.

For Appellants : Mr.V.T. Gopalan,Sr.Counsel
in both appeals for Mr. J. Srinivasa Mohan

For Respondents : Mr.G. Rajagopalan, Sr.Cousnel
in both appeals for Mr. Sundaresan for R1

Mr. S. Thiruvenkataswami for R4

Mr. R. Seetharaman
(party-in-person)

R3 to R7 given up in AS.768/85

No appearance for
R5 to R7 in AS.974/86

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COMMON JUDGMENT

The first defendant in the suit is the appellant in A.S.No.768 of 1985 and the defendants 2 and 6 in the suit are the appellants in A.S.No.974 of 1986. The first respondent has filed the suit in O.S.No.20 oF 1982 on the file of Subordinate Judge, Pattukottai praying for a preliminary decree for partition of 1/4th share in the properties mentioned in Schedules 1 to 9, or alternatively prayed for a decree for partition of 1/2th share in Schedule 1, 2, 3, 8 and 9, with reference to good and bad soil, by metes and bounds. That apart, he has also claimed partition of 1/5th share in the jewels or their value in 10th schedule.

2. The plaintiff's case was that the plaintiff and the defendants 2 and 3 are the undivided sons of the first defendant and they constituted a Hindu Joint Family owning joint family properties described in Schedules 1 to 9, besides other properties which were already sold. According to the plaintiff, the first defendant's father, viz., Chinnaiah Thever and his brother Kutty Thever were living at Ceylon doing money-lending, pawn broker and General Merchant business. The said Kutty Thevar has settled his claim with his brother, Chinnaiah Thever and returned to India and thereafter, Chinnaiah Thever was solely entitled to the business. After the said Chinnaiah Thever returned to India, the first defendant, being his son was managing the business and ultimately, the business came to be wound up.

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2 (a). It is the plaintiff's case that Chinnaiah Thever along with his sons, viz., first defendant and one Karuppaiah Thever were living as joint family along with his brother, Kutty Thever and his sons. In 1955, the properties in India were divided between the branches of Chinnaiah Thever and Kutty Thever by way of family arrangement. In the said partition, the said Chinnaiah Thever did not retain any share, but agreed for the division of properties into two equal shares by the branches of Chinnaiah Thever and Kutty Thever and he was satisfied with a half share of properties given to him being divided between his two sons, viz., first defendant and Karuppaiah Thever, since Chinnaiah Thever was getting pension of Rs.150/- from Ceylon. Therefore, by virtue of family arrangements certain items of suit properties were allotted to the first defendant family, while some other properties were allotted to the first defendant's brother Karuppaiah Thevar family and also to Kutty Thevar family. The plaintiff understands that by a partition deed dated 21.10.1959 the properties allotted to the share of family of first defendant were divided between the defendants 1, 2 and 3 for land ceiling purposes to which the plaintiff was not a party. According to the plaintiff, there was no partition and the division was only between the first defendant and his brother and Kutty Thevar. According to the plaintiff, in spite of the said partition dated 21.10.1959, the plaintiff and defendants 1 to 3 continued to be members of the Hindu Coparcenary. The plaintiff would state that the first defendant was maintaining the properties even after the partition dated 21.10.1959. The plaintiff would also state that there was an exchange of some of the properties allotted to his paternal uncle, Karuppaiah Thevar with the properties of first defendant family and in such documents also, all the members have joined in the execution.

2 (b). It is the further case of the plaintiff that between the first defendant family and his brother Karuppaiah Thevar's family certain properties were kept joint which were described as schedule-Q in the said partition deed. In a later division between the first defendant and his brother Karuppaiah Thevar, house properties at Pattukkottai were allotted to the first defendant's family while the house at Periyanayakipuram was given to the fist defendant's brother Karuppaiah Thevar towards his share. The house which was allotted to the first defendant's family was sold by him for the family benefits, viz., for rice mill and paddy business and putting up a house at Avanam and the agricultural lands were also sold for the business and for purchasing other properties, apart from construction of house. All the said purchases were made in the name of the first defendant as well as in the names of plaintiff and defendants 2 and 3 from and out of joint family income and from the money sent by the plaintiff and third defendant. According to the plaintiff, the first defendant has been completely maintaining the

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properties along with the second defendant who was living with him. The plaintiff states that the first defendant being the father of the plaintiff, received the presents given by the father-in-law of the plaintiff as well as the 2nd defendant and 3rd defendant who has also sent money from and out of his earning as an Engineer. The plaintiff has sent Rs.27,000/- to the first defendant for the joint family funds.

2 (c). The plaintiff would also state that as per the custom in the family, on the occasions of ear-boring ceremony and other important functions, the relatives and friends used to present cash called, "moi" and the same were received subject to repayment whenever similar functions were celebrated by the persons who made the cash presents. By the celebration of ear-boring ceremony of the second defendant's son, the first defendant has received cash of Rs.1,35,000/- and the same was retained for the joint family benefits. According to the plaintiff, the first defendant as the manager of the family was also having an agency with Food Corporation of India for purchasing paddy and he was having licences for dealing with wholesale paddy and rice and the income from the said business was also treated as joint family property. The plaintiff would also state that the first defendant has obtained Power of Attorney from the plaintiff and the 3rd defendant as they were away from the village so as to bind them in all the family dealings. The plaintiff has been working as a Mechanical Engineer in B.H.E.L. Since his service is required by the Malaysian Government, he is at present at Malaysia. According to the plaintiff, the first defendant was arranging to give major portion of properties to the second defendant by misusing the Powers given to him. Therefore, the plaintiff has revoked the Power on 18.7.1981 after coming to India. Likewise, the third defendant also revoked the Power. According to the plaintiff, this conduct has provoked the first defendant to create various records prejudicial to the interests of the plaintiff and the 3rd defendant. The plaintiff has demanded partition from the first defendant through mediators on 9.3.1982 which was evaded by the first defendant. Therefore, the plaintiff has filed the present suit for partition. He would also state that the plaintiff's mother died in December, 1977 and she was having jewels as mentioned in 10th Schedule. According to the plaintiff, the properties are inherited by the plaintiff and defendants 1 to 4, the 4th defendant being his sister. The plaintiff also states that for any reason, if the Court holds that the plaintiff was not a party to the partition and he should be construed as a coparcener along with the 1st defendant, the plaintiff is entitled to a half share in respect of schedule 1 to 3, 8 and 9 properties, besides 1/5th share in schedule-10.

3. The first defendant has filed a written statement. While denying various allegations raised by the plaintiff, the first

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defendant who is the father of the plaintiff, would state that the claim of the plaintiff is contradictory. While the plaintiff admits in one place that Kutty Thevar has settled all his claims with Chinnaiah Thevar at Ceylon and came to India, he has chosen to give a contradictory version that Chinnaiah Thevar and his sons were living as members of joint family along with his brother Kutty Thevar. While it is true that there was a family arrangement in the year 1955 and properties were divided between the branches of Chinnaiah Thevar and Kutty Thevar, it is denied that the land reforms registration is the basis for such family arrangement. It is also denied that there was no division as per family arrangement. The first defendant also denies the allegation that the plaintiff and defendants 1 to 3 constituted a coparcenary. It is the case of the first defendant that the very fact that later there was a division between the first defendant and his brother shows that there was a clear division of properties. The allegation that the income from properties was used for the rice mill and paddy business is also denied. It is also denied that the plaintiff and the 3rd defendant have sent moneys and the properties were purchased in the name of the plaintiff and the defendants 2 and 3 with the joint family income.

3 (a). The first defendant also denies that the plaintiff has sent Rs.27,000/-. Apart from denying the allegation regarding "moi", the allegation that the first defendant continued to be the manager of the joint family is also denied. The first defendant states that he has been working in Ceylon prior to 1944 and earned substantially and in 1948 when he visited India, he invested in a banks in India, a sum more than Rs.10,000/- under fixed deposit receipts. In the year 1947, the first defendant's father has transferred his interest in a partnership firm for a consideration of Rs.8,000/- and partnership was reconstituted superseding the earlier partnership by dropping the father's name, viz., Chinnaiah Thevar. The first defendant had been visiting India frequently bringing moneys and between 1949 and 1961, the first defendant brought more than Rs.22,891/- and the same was endorsed in the passport also.

3 (b). It is the case of the first defendant that the father of the first defendant, viz., Chinnaiah Thevar had only a site as his ancestral property and there was no ancestral nucleus to give rise to any income therefrom. When the father of the first defendant returned to India in or about 1948, the plaintiff was just born and the second defendant was about 4 years old and the third defendant was 2 years old. The first defendant states that to avoid any difference between himself and his brother Karuppaiah Thevar, he contented himself with whatever share was allotted to him and the father of the first defendant was well aware that there was no ancestral property and in fact before 1947 repatriation he allowed

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his brother Kutty Thevar to take away his properties leaving the remaining to the first defendant and his brother. According to the first defendant, that was the conscientious conduct of the first defendant's father to disclaim any share for himself. Therefore, the allegation that there was ancestral property of Chinnaiah Thevar available in the hands of the first defendant is false. At the time when the written arrangement was made in the year 1955, the plaintiff was a minor of 7 years old and the first defendant was acting as patria potestas to represent the plaintiff as his father and he had every right to agree for allocation to the defendants 2 and 3. According to the first defendant, the properties are neither ancestral, nor coparcenary or joint family properties and they are separate self-acquired properties of the first defendant. Therefore, sons of the first defendant have no manner of right to claim share. Since the third defendant was educated at Trichy, he was provided with a suitable lesser share and for the education of the third defendant at Trichy, the first defendant had to sell a small item of third defendant's share on 3.7.1961 for his educational expenses and he was also subsequently educated at St.Joseph College at Trichy and Engineering College at Coimbatore with considerable costs and strain. Similarly, the first defendant states that the plaintiff was educated at Pudukkottai and P.S.G. College, Coimbatore and his educational expenses were made only from and out of the allotment made to him under the arrangement stated.

3 (c). According to the first defendant, the plaintiff and the third defendant have no justification to protest against the family arrangement arrived at and they have no right to unsettle the settled. The first defendant also states that he was not getting money from anyone including his sons. It is the first defendant who has purchased lands at Lakshminarasimhapuram and Periyanayakipuram villages in the name of third defendant under registered sale deeds dated 13.10.1978 and 22.6.1978. The first defendant has purchased on 22.3.1979 only one item in schedule-8 in the name of the plaintiff. That apart, some lands in Perianayagipuram village and Lakshminarasimhapuram village were also purchased by the first defendant in favour of the plaintiff under registered sale deeds dated 27.6.1979 and 22.6.1978. According to the first defendant, the mill business, Avanam building, rice and paddy business and Food Corporation of India Agency are all separate properties of the first defendant. It was the first defendant who purchased the mill sites under three sale deeds and he had the means for the same, since he was having moneys in India which he had brought on various occasions, and there was no difficulty for the first defendant to purchase the sites. He has also brought gold and other ornamental jewels and coins besides cash from Ceylon.

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3 (d). On various occasions, he has also brought moneys to India. The first defendant has given "moi" to different parties to the tune of Rs.55,177/- and subsequently also he has spent a sum of Rs.42,722/- by way of "moi" and the first defendant was due to repay "moi" to the extent of Rs.19,720/-. According to the first defendant, there was no joint family and joint income. Mere association in the execution of some documents will not confer any right to the plaintiff. It is also denied that the first defendant and the second defendant are having joint living and joint income. According to the first defendant, they are distinct and separate. The first defendant would state that the plaintiff and third defendant are well-educated and the second defendant is uneducated and living solely depending on the income from agricultural properties. According to the first defendant, the properties not available for partition are included in the plaint. There are many properties stated in the plaint were in the name of the first defendant which were subsequently sold. The first defendant also denies the claim of the plaintiff in respect of schedule Nos.9 and 10.

4. The second defendant has filed a written statement, inter alia, contending that in 1955 there was a complete family division by way of arrangement and specific properties were allotted to the share of the second defendant and he was also put in possession and he has been in exclusive possession ever since the said date. The said arrangement was subsequently reduced into writing in 1959 by way of a registered document and at that time, since the second defendant was minor, he was represented by the first defendant being his father and after he became major, he started enjoying the properties directly. The exchange effected on 27.6.1965 was also to the knowledge of the plaintiff and the same was never questioned. The second defendant also states that after division of properties, he is enjoying the properties by cultivation and the plaintiff cannot claim any share in the properties mentioned in all the schedules. The second defendant has also pointed out that survey numbers of various properties are given wrongly. The second defendant states that he has purchased an extent of 44 cents in Avanam village described in Item No.1 of plaint schedule-6 and it is his separate acquisition. He also states that an extent of1.13 acres in Pulichankadu village described as plaint schedule-6 belongs to the wife of the second defendant, purchased with her siruvadu funds and it is the separate property of his wife, viz., 6th defendant Vasanthal, who is in actual possession as its owner. The second defendant is not aware of the existence of jewels in the plaint schedule-10. It is also the case of the second defendant that he has been carrying on the business in fertilisers jointly with the 4th defendant's husband and he is liable to account for the same and when a demand was made to him, he evaded the same, and it

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is at his instance, the plaintiff has filed the present suit for partition. In respect of Item Nos.1 to 5 of schedule-1 in Periyanayagipuram village of an extent of 6.29 acres, the same were leased out by the first defendant from 1965 onwards on yearly lease of paddy of 40 bags and they are in his leasehold cultivation along with his separate lands. That apart, the second defendant adopts various other averments made by the first defendant in his written statement. The second defendant also states that in any event, he has perfected title by adverse possession since he has been in possession of the properties from 1955, and in respect of his separate properties, he has the right on the basis of ouster and the claim of the plaintiff is barred by limitation.

5. The third defendant has filed a written statement. The third defendant substantially accepts the pleadings in the plaint including the arrangement of the year 1955. In respect of the partition dated 21.10.1959, it is the case of the third defendant that he is not aware of the same till recently and according to him, the partition is not only a sham and nominal, but also a void ab initio for the reason of unequal division and the third defendant is not bound by such partition deed. According to the third defendant, he also continued to be a joint family member along with the defendants 1 and 2. The third defendant states that he is not aware of any alienation. He also states that alienation was made by the first defendant as only the joint family manager for constructing a house at Avanam village and for putting up paddy business and rice mill. The third defendant would also state that the first defendant has been managing the entire properties as Manager of the joint family. It is also the case of the third defendant that the first defendant obtained Power of Attorney from him in order to bind him in dealing with the joint family properties and business. When the first defendant started misusing the power in order to allot major shares to the second defendant, the third defendant revoked the Power of Attorney. It is the case of the third defendant that at the time of death of his mother, she was having 65 sovereign of jewels which are described in Schedule-10. He also prays for a decree for partition of 1/4th share in schedule 1 to 9 properties and 1/5th share in schedule-10.

6. The fourth defendant, who is the daughter of the first defendant, has filed the written statement. According to her, she belongs to "Onpathu Nadu". As per the custom of "Onpathu Nadu", the jewels of mother are to be given to the daughter and therefore, all jewels mentioned in Schedule-10 are to be given to her. However, she claims 1/5th share in the Jewels mentioned in the schedule.

7. The 5th defendant is the purchaser of property, viz., 4th item in Schedule-3 at Avanam village from the first defendant under registered sale deed dated 6.8.1964 and after the purchase, he has

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planted coconut seedlings and now there are about 20 yielding coconut trees, aged about 17 years. The fifth defendant would also state that the said property was purchased by the first defendant from one Sethu Thevar under a registered sale deed dated 1.1.1961 and being the absolute owner, he has sold the property to the 5th defendant and the 5th defendant is the bona fide purchaser and he is in enjoyment of the same without any obstruction in respect of the said item of the properties.

8. The 6th defendant who is the wife of the second defendant has also filed a written statement. The 6th defendant was married to the 2nd defendant in the year 1968 and at the time of marriage, she was presented with jewels, cash and other seers as per the custom. Therefore, those presents have become her siruvadu funds in which others can have no right or claim. It is with the said funds, she has purchased 1.13 acres in Pulichankadu village described in schedule-6 in S.No.74/1. According to the 6th defendant, her husband 2nd defendant is a divided member from his father and living separately with the 6th defendant and the sale deed for the said property was got executed in the name of 2nd defendant, husband of the 6th defendant for the purpose of starting a coir industry. It is also the case of the 6th defendant that in respect of movable properties mentioned in Schedule-9, Items 11 to 14, they belong to the 6th defendant as they are part of customary seer presented to her at the time of marriage.

9. The 8th defendant who has purchased some of the properties, viz., item Nos.12 and 13 in Schedule 5 of the plaint from the 2nd defendant under registered sale deed dated 28.2.1980 would state that he is in uninterrupted possession of the properties for more than 12 years raising punja crops and paying kist to the Government and no one is entitled to the properties.

10. It is with the above pleadings, the trial Court has framed the following issues:

1. Whether the suit properties are liable for partition as joint family properties?
2. Whether schedule 6 to 8 are absolute properties of the first defendant?
3. Whether it is true that the partition of the year 1959 was not entered and acted upon?
4. Whether the first defendant has to pay any amount in respect of "moi" account?
5. Whether the 1st defendant has paid any amount, if so, to what extent?
6. Whether the first defendant is liable to account for the amount?
7. Whether schedule 7 and 8 properties were purchased from the money given by the plaintiff

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and third defendant?

8. Whether schedule 4 to 6 properties are absolute properties of the 2nd defendant?
9. Whether the particulars of suit properties are correct?
10. Whether the suit is bad for non-joinder of necessary parties?

11. The following additional issues were framed:

1. Whether the 5th defendant has acquired adverse possession in respect of property, viz., Item No.4 of schedule-3?
2. Whether the 5th defendant is entitled to equity relief?
3. Whether the property comprised in survey No.74/1 to the extent of 1.13 acres mentioned in the schedule-6 is the absolute property of the 6th defendant?
4. Whether items 9 and 11 to 14 in schedule-9 absolutely belong to the 6th defendant?
5. Whether the 8th defendant has acquired title by adverse possession in respect of item Nos.12 and 13 of the schedule-5 properties?
6. Whether the 8th defendant is entitled to equity relief?

12. On the plaintiff's side 87 documents were marked as Exs.A-1 o A-87 and five witnesses were examined, including the plaintiff as P.W.1. On the defendant's side, 112 documents were marked as Ex.B-1 to B-112 and six witnesses were examined out of whom, the 4th defendant was examined as D.W.1, the 3rd defendant as D.W.2, first defendant as D.W.5 and the 2nd defendant as D.W.6.

13. The trial Court, after elaborate trial, has held that the first defendant was conducting his business at Ceylon as a joint family member and it is not true that after paying a sum of Rs.8,000/- to his father Chinnaiah Thevar, the first defendant has conducted the business as his own business. The trial Court also found that the jewels mentioned in Schedule-10 are not liable for partition. In respect of movables in schedule-9, the trial Court has held that items 1, 2 and 4 are not joint family properties and are not liable for partition and all other items in 9th schedule are liable for partition. The trial Court further held that schedule 6 to 8 properties are not self acquired properties of the first defendant. It also found that the partition deed of the year 1959 has not come into effect. The trial Court has also found that the first defendant was not liable for accounting either for "moi" or any other amount. Ultimately, the suit for partition was decreed granting 1/4th share to the plaintiff in schedule Nos.1 and 2 and in

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the third schedule, items 1 to 3, schedule 4 and 6 to 8, all properties except item Nos. 12 and 13 in 5th schedule and item Nos.3 and 5 to 19 in 9th schedule. The third defendant was also granted 1/4th share in the above said properties. The trial Court also held 4th item in 3rd schedule and items 12 and 13 in 5th schedule belong to the defendants 1 and 2 respectively and declared that item Nos.1,2 and 4 in 9th schedule properties are absolute properties of the first defendant. The trial Court also held that the plaintiff and the third defendant are not entitled to account for 10th schedule properties and a preliminary decree in the abovesaid manner was passed by the trial Court. It is aggrieved by the said judgment and decree of the trial Court, the defendants 1 and 2 have filed the above first appeals.

14. Pending the above appeals, the appellant in A.S.No.768 of 1985 died on 18.7.1995. The second respondent in the said appeal who is the appellant in A.S.No.974 of 1986 claims to have the right of his father, the appellant in A.S.No.768 of 1985 as per Will dated 2.9.1985 said to have been executed by the said K.S.Ramanathan, bequeathing all the properties belonging to the appellant in A.S.No.768 of 1985 to him, has filed C.M.P.No.11380 of 1985 in A.S.No.768 of 1985 before this Court to transpose him as appellant in the said A.S.No.768 of 1985 to prosecute the appeal. According to him, his father, the original appellant K.S.Ramanathan in the said Will dated 2.9.1985 has authorised him to conduct litigation after his death and therefore, by virtue of the Will, he has succeeded the estate of the appellant. The said application was resisted by the first respondent in the appeal who was the plaintiff in the suit and the third respondent.

15. According to the first respondent in the counter affidavit, the appellant in A.S.No.768 of 1985 died on 18.7.1985 intestate and he has left behind himself, the petitioner in the said C.M.P.No.11380 of 1985, and the third and 4th respondents as his sons and daughter and therefore the petitioner alone cannot claim that he is entitled for prosecuting the appeal. It is also his case in the counter affidavit that the claim of the petitioner basing on the alleged will of the appellant dated 2.9.1985 is not true. Likewise, the 4th respondent in the appeal, viz., Janaki, daughter of the appellant K.S.Ramanathan also claimed that the appellant has executed a Will dated 24.3.1995 bequeathing his estate in her favour. It was in those circumstances, this Court, by order dated 29.9.1995, directed the trial Court to decide as to the genuineness of the said Wills and submit its finding under Order XXII, Rule 5 C.P.C. as to who is entitled to succeed the estate of the testator appellant and it was with that direction, the matter was forwarded to the trial Court for enquiry and recording its findings. The trial Curt, based on the said direction given by this Court, conducted enquiry relating to the abovesaid wills dated

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2.9.1985 and 24.3.1995 in I.A.No.460 of 1995 in O.S.No.20 of 1982 and submitted its report on 30.4.1995 with the following findings:

1. The will of K.S.Ramanathan Thevar dated 2.9.1985, Ex.A-1 produced by the petitioner Ramamurthi is genuine, true and valid.
2. The will alleged to have been executed by Ramanathan Thevar dated 24.3.1995, Ex.B-4, produced by Janaki, 4th respondent in A.S.No.768 of 1985 is not true, genuine and valid.

16. It is seen that the trial Court has given the said finding after examination of two witnesses, P.Ws.1 and 2 on the side of petitioner in the transpose application (2nd defendant in the suit) and also marked documents as Exs.A-1 to A-12 apart from examining 8 witnesses on the respondent side, viz., R.Ws.1 to 8 and marking 4 documents as Exs.B-1 to B-4. The trial Court analysed the Will dated 2.9.1985 marked as Ex.A-1 under which the second respondent in the appeal, Ramamurthi claimed his right stating that the appellant, his father K.S.Ramanathan has bequeathed all his estate in his favour and also Ex.B-4 Will dated 24.3.1995 produced by the 4th respondent Janaki, daughter of the appellant K.S.Ramanathan claiming that the said Will was executed by her father by bequeathing his properties in her favour. The trial Court while giving findings as per the direction of this Court, has found that the attesting witness of Ex.A-1 Will dated 2.9.1985, which is a registered document, was examined as P.W.2 (Marimuthu) who has given cogent evidence stating that he along with one Thangavelu attested the Will and that they have seen K.S.Ramanathan signing the Will Ex.A-1 and in turn, Ramanathan has seen the witnesses signing the said Will. Finding that there was no contrary evidence to the effect that Ramanathan was not in any way incapacitated physically or mentally and also finding that even according to the first respondent herein (plaintiff in the suit), the said Ramanathan was a strong willed man, has given a finding that Ex.A-1 will stands proved in the manner known to law and it is in sufficient compliance of section 68 of the Evidence Act and section 63(c) of the Indian Succession Act. The trial Court has also found that on evidence it is clear that Ramanathan Thevar would have in all probabilities thought of bequeathing his properties in favour of the 2nd respondent in the appeal, Ramamurthi who was the petitioner in C.M.P.No.11380 of 1995.

17. The trial Court while considering the will produced by the 4th respondent Janaki, marked as Ex.B-4 dated 24.3.1995 said to have been executed by the appellant Ramanathan bequeathing his estate in her favour, has clearly found that the said will is not a genuine and true document. In fact, the trial Court has compared the signatures of Ramanathan Thevar as found in the admitted letters

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written by him, marked as Exs.A-6, A-7, A-8 and A-11 with the signature found in Ex.B-4 will and found that even to a naked eye, the disputed signature in Ex.B-4 is not comparable with the admitted signatures. The said Ex.B-4, which is not a registered document, while compared to Exs.A-1 and A-2 wills wherein Ramanathan used to be very brief, contains minute details about all cases. The Court has also correctly found that if really Ex.B-4 will was true, Ramanathan Thevar would have contacted his counsel at Madras to withdraw his appeal. That apart, the Court has also found that even as per the document produced by the 4th respondent, viz., diary of Ramanatha Thevar, marked as Ex.B-5, there is no entry about the will dated 24.3.1995. The Court also found contradiction in the evidence of R.Ws.7 and 8 stated to be the attesting witnesses of Ex.B-4. It is on that clear finding, the trial Court has sent its report. The first respondent in the appeal who was the first respondent in C.M.P.No.11380 of 1995 has filed objection to the finding submitted by the trial Court. Likewise, the third respondent in the appeal, R.Seethraman has also filed his objection. In the said objection, third respondent in the appeal Seetharaman has taken a ground that he was not given notice bythe trial Court while conducting enquiry about genuineness of the said wills in I.A.No.460 of 1995 in O.S.No.20 of 1982. Apart from other objections, he would also state that his father, appellant wanted to enter into a deed of compromise, which was signed by 5 V.I.Ps. in the village and witnessed by the entire village. He has also stated that since he has not been given notice in I.A.No.460 of 1995, he was deprived of opportunity of submitting certain relevant materials and documents and also sought for remanding the matter to the lower Court.

18. It is seen that after the report was submitted by the trial Court, this Court, by order dated 6.9.1996, considering the objections raised by the parties to the said findings and observing that the genuineness or otherwise of the said wills can be decided at the time of disposal of the appeal, has ordered transposing of the second respondent as the second appellant in the appeal without prejudice to the rights of the parties. The operative portion of the said order is,

> "Now that the appellant is dead, in order to prosecute the matter further, any one of the Legal Representatives have to be transposed as the appellant, otherwise, the appeal automatically abates. In order to keep the appeal alive and to give an opportunity to the parties to agitate their rights before this Court, I am of the view that the petitioner herein can be transposed as appellant without prejudice to the rights of the other parties which can be gone into at the time of final disposal of the appeal. Hence, the C.M.P. is ordered as prayed for."

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Accordingly, the second respondent in the C.M.P. has been transposed as second appellant in the appeal.

19. It appears that the second respondent in the appeal R.Seetharaman has filed an application before this Court in C.M.P.No.17467 of 1996 to issue subpoena to Thiru Arun Chinnappa, Advocate, to appear before this Court and explain as to how he had appeared before the trial Court during the time when the trial Court conducted enquiry as per the order of this Court to give findings in respect of genuineness of the wills, when he has not authorised the said advocate to appear on his behalf, since he has not received notice to appear in I.A.No.460 of 1995 and in that C.M.P. while rejecting the same, this Court has passed the following order:

> "Notice cannot be issued to advocate practising in Sub Court, Thanjavur to come to this Court and explain as to how he has appeared on behalf of the petitioner herein in Pattukkottai Sub Court in I.A.No.460/95 in O.S.No.20/82. This petition is therefore rejected."

Against the said order of the learned Single Judge, the third respondent herein has filed an appeal in L.P.A.No.36 of 1996. While dismissing the said appeal, the Division Bench has passed the following order:

> "Preserving all the rights to the appellant to agitate such matters at the time of the hearing of the appeal A.S.No.768/85 this present appeal against the order refusing to summon the advocate is dismissed. "

20. In respect of the findings submitted by the trial Court, the third respondent filed objections and also appeared as party-in-person. He submitted that he has not been given notice in I.A.No.460 of 1995 in O.S.No.20 of 1982 and therefore, prayed for remanding the matter again to the trial Court. The said contention cannot be accepted for the reason that the purpose of remitting the matter by this Court earlier to the trial Court was to find out the genuineness of the Will dated 2.9.1985, Ex.A-1, produced by the second respondent in the appeal and another will dated 24.3.1995 marked as Ex.B-4 and produced by the 4th respondent, both claiming to have inherited the estate of the appellant K.S.Ramanathan under the said respective wills and to find out as to who is the person who can be eligible to conduct the said appeal transposing as appellant and also to submit a report. It is not the case of the third respondent in the appeal that he is also claiming any right under these wills even though he may make his claim that in the absence of both the wills, as one of the legal heirs, he will be entitled to inherit the properties jointly. In these circumstances, whether the counsel has represented him in the trial Court in I.A.No.460 of 1995 in the enquiry regarding the genuineness of the

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said wills is not a material factor for deciding the issue involved. In this view of the matter, the objection raised by the third respondent seeking direction to remand the matter once again to the trial Court for submitting fresh findings after hearing him, cannot be accepted for the reason that such an exercise will not be of any use in respect of the decision about the genuineness of the wills, Exs.A-1 and B-4. In view of the same, the claim of the third respondent is rejected.

21. Mr. V.T. Gopalan, learned senior counsel appearing for the appellants in both the appeals has chosen to raise a preliminary issue about the limitation for filing suit for partition by the plaintiff. According to him, at the time when Ex.A.1-Partition Deed was entered on 21.10.1959, in which the second and third defendants have been allotted some properties along with properties allotted to Kutty Thevar and Karuppiah Thevar, who is the brother of the first defendan. The plaintiff was a minor and he became major in 1966; the third defendant became major in 1964 and the second defendant attained majority in 1962 and the plaintiff, who has attained majority in 1966 has chosen to file the present suit on 29.03.1982, which is 16 years after his attainment of majority and therefore, according to the learned senior counsel, the suit should be dismissed as barred by limitation.

22. Even though this point was not raised as an issue before the Court below and the question of limitation is a mixed question of fact and law, according to the learned senior counsel, since the facts relating to the period of attainment of majority by the plaintiff and other factors are almost admitted and they are also found by the trial Court in evidence, What remains is the legal point regarding the maintainability of the suit as per the Limitation Act. He would submit that either by applying Article 59, which relates to the cancellation of Deed by way of recession, the period of limitation is three years from the date of knowledge, and even by applying Article 110 of the Limitation Act, the person who is excluded from the family and who will have the right, the period of limitation is 12 years from the period of knowledge of exclusion and therefore, according to him, by operation of law, the suit is barred by limitation.

23. According to the learned senior counsel, the mixed question of fact and law in the present context can be agitated in the appeal and if the point of limitation is taken into account, there is an error apparent on law, and in support of his submissions, he would rely upon the judgement of the Supreme Court rendered in Burmah Shell Co. vs. Belgaum Municipality (AIR 1963 SC 906), apart from the judgement in the case of L.Sundaram & another vs. Lakshmanan (died) and others (2003 (2) L.W.163). He would submit that on the analysis of the entire records, it should be clear that the

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plaintiff, who has become major in 1966 was aware of his exclusion from the family and since the first defendant being the father and guardian has signed the partition deed in 1959 under Ex.A1 on behalf of the plaintiff, the knowledge of the first defendant is deemed to be the knowledge of the plaintiff. He placed reliance on the Division Bench decision of this Court in Sri Gajapati Narasimha Deo Garu vs. Sri Gajapati Krishnachendra Deo Garu (1919 Vol.37 MLJ 256). He would further submit that in respect of the third defendant, who is given a share under Ex.A-1 partition deed, if the share given to him is not adequate on the basis that there should be equal partition, he should have raised the same within 3 years from the date of his becoming major. He would further submit that the third defendant being a party to the document, who is given a share cannot claim a partition, except to claim a relief to set aside the earlier partition deed.

24. Apart from the said preliminary arguments regarding the maintainability based on limitation, on merits also the learned senior counsel would submit that even before the partition in 1959 under Ex.A1, there is no evidence to show that the 1st defendant's father Kutty Thevar was doing joint business and purchased the properties as joint family properties and the plaintiff who should establish by pleadings and evidence that a joint family existed before the partition in 1959, has failed to plead and prove the same. On the other hand, there are ample evidence to prove that it was the first defendant's father Chinnaiah Thevar who earned all moneys. He would submit that the existence of joint family before 1959 partition with particulars has neither been pleaded, nor proved especially when the categorical stand of the 1st defendant is that except the vacant land, there was no ancestral property whatsoever from whose income his father Chinnaiah Thevar could have purchased other properties.

25. The learned senior counsel would further contend that even assuming that there was a joint family in existence, such joint family character comes to an end after the partition that has been effected in the year 1959 under Ex.A1. According to him, the trial court has wrongly come to the conclusion that even though Ex.A1 partition deed has been executed, the same has not been given effect to which is based on assumption. He would submit that admittedly as per Ex.A1 partition deed, the first defendant's brother Karuppiah Thevar who was examined as P.W.5 has got a separate share apart from the shares allotted to Kutty Dever's branch and the remaining properties have come to the hands of the 1st defendant and defendants 2 and 3 and they were in enjoyment of the respective shares, and it was only the plaintiff who was excluded from the partition, and therefore it cannot be said that Ex.A1 partition deed was not given effect to. He would further submit that in spite of Ex.A1 partition deed, if the plaintiff still contends that there was

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a joint family, the issue of re-union is a question of fact to be pleaded and proved and therefore by relying upon the judgement of this Court rendered in Venkataramayya vs. Tatayya (1943(2)MLJ 83) and the judgment of the Apex Court in Bhagwan Dayal vs. Reoti Devi (AIR 1962 SC 287), he would submit that in that aspect, the suit is devoid of any merit. He would further submit that the plaintiff himself indirectly admits Ex.A1 by which Kutty Thevar and the 1st defendant's brother Karuppaiah Thevar have been allotted shares, but says that the 1st defendant's branch alone continued to be joint to escape from the Land Reform Legislation. Except this, there are no other pleadings. On the other hand, there are abundant records to show that the properties were separately enjoyed by defendants 1 to 3. Therefore, the finding that Ramanathan branch alone continued to be joint in spite of Ex.A1 partition deed, according to him, is not correct. He would submit that to prove joint family, the plaintiff has brought four witnesses, out of whom, PW.3 was opposed to the first defendant in respect of some purchase of properties and P.W.4 was the father-in-law of the 3rd defendant. On the other hand, P.W.2, who is said to be a panchayatdar has admitted that there was a division in the first defendant's family. He would also submit that P.W.5, another witness examined on the side of the plaintiff admits that he has given particulars to the plaintiff for filing the suit and the parties are in enjoyment of their respective shares from 1959 onwards. That apart, he would submit that there have been exchange of properties between the 1st defendant and 7th defendant and 2nd defendant and 7th defendant which were done with the knowledge of the plaintiff and the 3rd defendant under Exs.A9 and A8 and the 1st defendant under Exs.A3 to A5 purchased properties from his own money. The learned senior counsel has also contended that in one of the documents executed by 7th defendant, the property allotted to the 2nd defendant has been shown as boundary and the 2nd defendant has also produced various documents to show that he has got public records transferred in his name in respect of the properties allotted to him. He would also submit that the very fact that the plaintiff and the 3rd defendant have executed power of attorney in favour of 1st defendant in the year 1970 and 1972 under Ex.B10 and A-82 shows that there has been a division. Placing reliance upon on some of the letters marked as Exs.A74 to A-78, A-84 and A-85 wherein there is a reference to 'our lands' and also the voters' list Ex.A-81 and the letter written by the father to the sons wherein the term 'our family' is used, the trial court, taking these isolated facts into consideration, has passed a decree of partition by presuming that there is a joint family and according to the learned senior counsel for the appellants, the judgment of the trial court is not on proper evidence. The learned senior counsel would also submit that after the death of the 1st defendant the claim of the 2nd defendant under a Will executed by him dated 2.9.1985 was considered to be genuine by the learned trial Judge by way of finding as per the directions of this court. He would submit

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that the trial court in that finding has clearly found that the Will, which has been marked as Ex.A1, stood proved in accordance with law and that the examination of one of the attesting witnesses is sufficient to prove the Will by placing reliance on the judgement of the supreme Court rendered in M.S.P. Rajesh vs. M.S.P. Raja and others (1994 (1) MLJ 216) and Palanivelayutham Pillai vs. Ramachandran (2000 (6) SCC 151). On the other hand, the Will produced by the 4th defendant dated 24.03.1995 has been proved to be a forgery. Therefore, according to the learned senior counsel, the trial court has not decided the issues in accordance with law and the decision is mostly on surmises and liable to be set aside.

26. On the other hand, Mr.G.Rajagopalan, learned senior counsel appearing for 1st respondent in the appeals (plaintiff in the suit) would submit that as far as the preliminary issue, viz., the point of limitation is concerned, the same was not raised at any point of time by the 1st and 2nd defendants and even in the grounds of appeal before this Court the issue has not been raised and therefore, the appellants cannot be permitted to raise the issue of limitation for the first time. According to the learned senior counsel, even by applying Article 110 of Limitation Act, there must be clear proof of exclusion of one of the joint family members and this fact has not been pleaded by defendants 1 and 2. Therefore, according to him, if the claim of the 1st and 2nd defendants is the exclusion of plaintiff, it must be first proved that there existed a joint family and then, it must be pleaded and proved as to the exclusion of the plaintiff and that exclusion must be with the knowledge of the plaintiff and after 12 years of knowledge the limitation would come into effect and therefore, according to the learned senior counsel for 1st respondent, there is absolutely no ground to set aside the judgement of the trial court by applying the period of limitation. He would also further submit that inasmuch as the 1st respondent/plaintiff is not even a party to Ex.A1 partition deed, the question of filing a suit to set aside the said document does not arise. He would insist that the exclusion of the plaintiff from the joint family has not been proved especially in the circumstances that under Ex.A.1 shares have been given to family members, who are not entitled to as per law. He would submit that it is true that the knowledge of the guardian can be taken as the knowledge of the minor unless and until the guardian is acting on behalf of the minor, but under Ex.A.1 partition deed, the plaintiff/first respondent is not a party and therefore, it cannot be said that he was represented by the father. He would further submit that when originally the first defendant himself has not raised the plea of limitation, the second defendant, who has now entered into the shoes of the first defendant by way of transposing himself as the appellant cannot raise a new plea of limitation and the transposed appellant cannot give a go-bye to the pleadings of the first defendant by pleading a stand contrary to the stand taken by the

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party on whose behalf he is continuing the appeal. He would also submit that the knowledge of the first defendant cannot be deemed to be the knowledge of the plaintiff, especially when there is no pleading by the first defendant. He would submit that the trial Court has clearly found that there was joint family nucleus which generates income to purchase properties under Exs.A.11, A.33 and Exs.A.44, A.76, A.87, A.85 and A.10. He would also submit that simply because the first defendant has sold the properties under Ex.A.10, wherein all the parties have joined in execution, it cannot be stated that the plaintiff is not entitled to a share. He would also submit that the first defendant, on remand of the matter for the purpose of finding about the Wills, has filed a Will dated 20.08.1981 marked as Ex.A.2, wherein the second defendant has admitted that the joint family continued and plaintiff, first defendant and third defendant constituted a Hindu joint family. Therefore, according to the learned senior counsel, there was no question of any limitation.

27. The learned senior counsel would further submit that the trial Court on each and every issue has clearly found that the partition deed Ex.A.1 executed in the year 1959 has never been acted upon and even after that period the properties were enjoyed by the plaintiff, defendants 1 to 3 jointly and in fact it is admitted that the plaintiff and third defendant have contributed some of the moneys.

28. The third respondent R. Seetharaman, who has appeared as party-in-person while adopting the arguments made by the learned senior counsel for the first respondent, would mainly contend that the first defendant in the suit has been under the control of the second defendant. His main contention is that Ex.A.1 Will produced after remand for giving a finding by the trial Court is procured by the second defendant, since the first defendant has been under his control. According to him, under Ex.A1 registered partition deed dt.21.10.1959, the 2nd defendant was allotted 113 acres and he was allotted 2.75 acres and nothing was allotted to the plaintiff and the partition itself was done for the land ceiling purpose. He would also state that he came to know about the partition for the first time only after 20.08.1981 when the 1st defendant has executed a Will. According to him, the power of attorney given by him to his father in Ex.B1 dated 27.06.1965 was only to bind him in dealing with the joint family properties and business. He was also relying upon some of the letters executed by the 1st defendant to him marked as Ex.B3 in which the 1st defendant is stated to have informed him that the 2nd defendant's wife has not treated him properly. He would submit that when it was the case of the 1st and 2nd defendants that there was a family arrangement in 1955 and properties were divided and thereafter the same was put in writing in 1959, there is no necessity for the 1st and 2nd defendants to include the plaintiff as

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well as the 3rd defendant as executants in Ex.A-10 sale deed dated 27.3.1967. He would also repudiate the claim of the 1st defendant that the Avanam building, rice and paddy business and FCI Agency are separate properties and business of the 1st defendant. By relying upon the letters written by the 1st defendant, he would submit that the plaintiff and himself during their marriage have received dowry and the same has been given to the 1st defendant at that time. While admitting that the 1st defendant has purchased 1.13 acres of land in Pulichangadu village in the name of the 2nd defendant's wife in 1970, he would state that the said purchase was made by the 1st defendant only to keep her happy since she has not behaved properly during his life time. He would submit that after cancellation of the general power given to the 1st defendant, the plaintiff and first defendant have purchased various properties in the names of their respective wives. He has also relied upon Exs.A-19, 11, A-33 and A-44 to substantiate his contention that even after the partition deed in the year 1959 under Ex.A1, the joint family continued.

29. After hearing the arguments of the learned senior counsel for the appellants and the first respondent and also the submissions of the 3rd respondent who appeared in person and on going through the judgment of the trial court, apart from various records, the following points arise for consideration in this appeal:

(1) Whether the suit filed by the plaintiff is hit by the period of limitation and therefore liable to be dismissed on the said point as a preliminary issue ?

(2) Whether the findings of the trial court that even after Ex.A1 partition deed dated 21.10.1959 the joint family between the 1st defendant and his sons defendants 2 and 3 and the plaintiff continued, and if so, whether the properties in respect of which the right has been given to the plaintiff as well as to 3rd defendant are liable for partition?

30. Point No.1: At the outset, the reference to the pleadings as well as the grounds of appeal shows that the said point relating to limitation has not been raised earlier and the same is raised for the first time while arguing the appeals. As for the age of the plaintiff and the 3rd defendant, at the time of execution of Ex.A1, there is no dispute. Even the trial court has found that at the time of execution of Ex.A1, the plaintiff, defendants 2 and 3, who are the sons of the 1st defendant were minors. It is also clearly stated that the plaintiff became major in 1966; the second defendant in 1962 and the 3rd defendant in 1964, as it is found by the trial court. The execution of Ex.A1 is not disputed. The case of the plaintiff and the 3rd defendant was that Ex.A1 was not given effect to. A reference to Ex.A1 partition deed shows that the said

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partition was effected between 16 persons including the 1st defendant being the son of Chinnaiah Thevar for himself along with his son Ramamurthi, the 2nd defendant who was at that time 14 years old, another son Seetharaman, namely, 3rd defendant, who was at that time 12 years old, apart from Karuppiah Thevar, who is the brother of the 1st defendant Ramanathan and the legal heirs of Chinniah Thevar's brother Kutty Thevar. Therefore, in the said document, the plaintiff's name does not find a place. The said document states that there was a oral partition even before Ex.A1 document in the year 1955 itself, by which the properties were divided and enjoyed separately by the parties. In the said Ex.A1 document, B schedule property was allotted to the 1st defendant, while C-schedule property was allotted to the 2nd defendant; G-schedule was allotted to the 3rd defendant and B-schedule property was allotted to Karuppaiah Thevar, who is the brother of the 1st defendant, apart from the share given to the other co-sharers. In addition to that, in view of the allotment of shares, 1st defendant and his brother Karuppaiah Thevar were directed to contribute certain amount. It is also stated in the said document that after the oral partition effected in the year 1955 whatever properties purchased in individual names should remain as individual properties. It is also stated that the properties which are left out shall be enjoyed by partition between the 1st defendant and the Karuppiah Thevar's family. Therefore, the contention of the learned senior counsel for the appellant in these appeals is that when at the time of execution of Ex.A1 partition deed, the plaintiff was a minor and the defendants 2 and 3 who were also minors at that time, were allotted shares, but the plaintiff was not allotted any share, meaning thereby that in that partition, the plaintiff was given up. His contention is that admittedly when the plaintiff who was a minor at the time of execution of Ex.A1 became major in 1966, he should have had knowledge about Ex.A1 partition deed in 1966 itself, but he has chosen to file the suit for partition only on 20.3.1982 and therefore, the suit should be treated as barred by limitation. The pleadings in respect of the said Ex.A1 partition deed dt.21.10.1959 raised by the plaintiff in the plaint is as follows:

> "The plaintiff now learns that in reducing the said family arrangement in writing on account of Land Reforms Legislation, by means of a partition deed dt.21.10.1959 the total extent, of properties got by each group or branch had been kept up, but it has been further split up and given in separate schedule in the name of defendants 1 to 3 for Land Ceiling purposes. The plaintiff is not a party to that document. However, there was no actual division either in the status or with reference to properties as between the first defendant and his sons. The division was only between first

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> defendant and his brother and Kutty Thevar's branch on the other hand. Plaintiff and defendants 1 to 3 continued to be members of the Hindu Co-parcenary."

Therefore, the plaintiff, while admitting the family arrangement of the year 1955, would state that he came to know about the 1959 partition only at the time of filing the suit. Therefore, according to him, he had the knowledge about Ex.A1 only at the time of filing the suit.

31. In the written statement, the 1st defendant states that at the time of executing Ex.A1 in 1959, the plaintiff was a minor and therefore, as a guardian and father he had a right to represent the plaintiff as a Patria potestas and also to represent 2nd and 3rd defendants to allot properties in their favour. The specific statement in that regard by the 1st defendant in the written statement is,

> "In the year 1955, at the time of the family arrangements in the presence of defendant 1 and uncle of the plaintiff, the plaintiff was a minor about 7 years old and when the said arrangement was reduced in writing in 1959, this defendant acted as a Patria Potestas to represent his minor son and he had every right to agree for the allocations to defendant 2 and defendant 3 as the plaintiff was only a ward under protection and care of this defendant".

32. As it is seen from Ex.A1 and also it is admitted that defendants 2 and 3 were also minors at the time of execution of Ex.A1 in 1959, but they were allotted some of the properties, whereas in respect of the plaintiff alone, who was also minor, represented by the 1st defendant as guardian, no property was allotted. It is the case of the 1st defendant that the plaintiff was under his protection and care.

33. However, the 2nd defendant in his written statement has stated that under 1959 settlement by which he was allotted the properties and the said properties have been taken over by him and he has been in continuous possession from the said date and in any event he has perfected title by adverse possession and the plaintiff is ousted to have any claim of right over the property. While stating so, the 2nd defendant states that,

> " This defendant in any event has perfected title by adverse possession and ouster in respect of the separate properties of this defendant and the claim of the plaintiff is barred by limitation".

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34. The plaintiff while giving evidence as P.W.1 has not chosen to state anywhere as to when he came to know about Ex.A1 partition deed dated 21.10.1959. On the other hand, the close analysis of his entire evidence shows that he had knowledge about the family arrangement in the year 1955 and subsequent partition in the year 1959 and also about all the subsequent documents. He has stated at one place,

> "1959ல் பாகப் பிரிவினையிலும் சின்னையா தேவருக்கு பங்கு எதுவும் தனியாக ஒதுக்கவில்லை. 1955ல் சின்னையா தனியாக பங்கு ஒதுக்கிக் கொண்டார். தனக்கு பங்கு எதுவும் பாகத்தில் சின்னையா வைத்துக் கொள்ளவில்லை என்று பிராதில் கூறப்பட்டு இருந்தால் அது சரியல்ல."

He would further state,

> "இந்த பட்டுக்கோட்டை வீடு எக்ஸ்.ஏ.1ல் பத்திரத்தில் ஞ ஞஞ அட்டவணையில் உள்ளது என்று நினைக்கிறேன். அந்த வீடு உள்ள மனைக்கட்டு 1வது பிரதிவாதி பேரில் 1955 முதல் 1958க்குள் வாங்கப்பட்டது. வீடு பிறகு கட்டப்பட்டது. 1955ல் வீடு கட்டும்போது சொசைட்டி கடன் 1வது பிரதிவாதி வாங்கினார். எவ்வளவு ரூபாய் கடன் வாங்கினார் என்று தெரியாது"

He states in his cross examination that,

> "2ம் பிரதிவாதி, 7ம் பிரதிவாதி 1965ல் பாிவாத்தனை செய்து கொண்டார்கள். பாிவாத்தனைப்படி அவரவர்களுக்கு சொத்து போய்விட்டது. 1959 பாகப்பத்திரத்தின் அடிப்படையில் தான் பாிவாத்தனை செய்யப்பட்டது. அந்த பாிவாத்தனையான சொத்துக்களுக்கு யார் பேரில் பட்டா என்று எனக்கு தெரியாது."

Therefore, the above said evidence of the plaintiff clearly establishes that he had knowledge about Ex.A1 1959 document partition deed at least from the date when he has become major in the year 1966. Even though it is true that the plaintiff has not been allotted property under Ex.A1 partition deed while the 2nd and 3rd defendants have been allotted properties, the question that arises is whether his right of partition will survive 16 years after his knowledge about his ouster from the joint family properties. As correctly pointed out by the learned senior counsel for the appellants, the factual position is clear, but the only question remains to be answered is the legal issue as to whether the plaintiff has come to the Court within the period of limitation as prescribed under the Limitation Act 1963?

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35. Section 3(1) of the Limitation Act 1963 specifically states that even if the period of limitation is not pleaded as a defence, the suit instituted after the period of limitation shall be dismissed subject to Sections 4 to 24, dealing with the time during which the Court is closed.

> "Section 3(1) of the Limitation Act:
> 3.Bar of limitation.-(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

Regarding the person who has legal disability like minor, insanity or idiocy, Section 6 of the Limitation Act says that the period of limitation shall run after the disability is ceased, which means that in respect of a minor, the limitation starts when he becomes major. Section 6(1) reads as under:

> "Section 6. Legal disability.-(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule."

Section 8 of the Limitation Act, which is an exception to Section 6, gives three more years time for the period of limitation from the cessation of disability in the following words.

> "Section 8. Special exceptions.- Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application."

Part 4 of the First Division in the Schedule of the Limitation Act, viz., Article 59 deals with the suit, "to cancel or set aside an instrument or decree or for the rescission of a contract. The period of limitation for the same is stated to be three years from the time when the facts entitled the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him".

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36. By applying the said Article, for cancelling Ex.A.1 partition deed dated 21.10.1959, for the reason that the plaintiff was not a party to it, the plaintiff who attained majority and became major in 1966, in the light of Sections 6 and 8 of the Limitation Act, should have filed the suit in the year 1972, since he had knowledge on the date of his majority.

37. If the grievance of the plaintiff is that under Ex.A1 he has been excluded from joint family properties and therefore he has got a right of enforcing his share, in such matter, Article 110 states "by a reason excluded from a joint family property to enforce a right to share thereunder", the period of limitation for filing the suit is 12 years from the time "when the exclusion becomes known to the plaintiff". By applying this Article and based on the pleadings and evidence, the plaintiff had the knowledge about his exclusion from the joint family under Ex.A1 partition deed, when he became major in 1966, and by a conjoint reading of sections 6 and 8 along with said Article by giving the benefit of said exemption under Section 8, it is clear that the plaintiff should have filed the suit in the year 1981, whereas the present suit was filed on 20.03.1982. Therefore, without even going into the other contention raised by the learned senior counsel for the appellant about the knowledge of guardian which could be imputed to that of the minor, I am of the considered view that on the legal issue of filing of the suit, since the factual issue is very clear based on the pleadings and evidence, the suit for partition filed by the plaintiff, claiming a share knowing that he has been excluded from the joint family properties is certainly barred by limitation.

38. As rightly pointed out by the learned senior counsel for the appellants, when the 1st defendant being the father and guardian of the plaintiff, has signed Ex.A1 partition deed dated 21.10.1959 even if it does not expressly state that he enters into such partition deed in the representative capacity on behalf of his minor son, the capacity can be presumed unless it is shown that there is conflict between him and his son. This was the view taken by this Court in the judgement rendered by K.Sampath,J. in L. Sundaram and another vs. Lakshmanan (died) and others(2003(2) L.W.163), wherein the facts are almost similar, and after analysing the documents and referring to a catena of decisions, the learned Judge has specifically held as follows:

> " 25. .... Though the second defendant might not have stated in Ex.B-1 that he was executing the document for himself and on behalf of his sons, the principle is well settled that where a father enters into any transaction affecting the family, h e need not expressly state that he enters into it in his representative capacity. This capacity will

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ordinarily be presumed unless it can be shown that there is a conflict of interest between him and his sons. Thus, Ex.B-1 must be deemed to be binding on the plaintiffs and the third defendant as well, subject to the renunciation being for consideration representing the value of the share of the branch of the member renouncing. It can be considered as a partition of his branch including the interests of his sons in the joint family property.

26. Ex.B-1 is dated 25.5.1956 and it has been found to be a true and genuine document, under which the second defendant validly released the rights of his joint family in the joint family properties in favour of the first defendant, who had undertaken to discharge the family debts. The learned counsel for the appellants fairly stated that the appellants are not challenging the finding that Ex.B-1 was not obtained by fraud and misrepresentation. The plaintiffs have not taken steps to challenge the release under Ex.B-1. Once the release is accepted as a true and valid document binding on the plaintiffs and defendants 2 and 3, then everything else will follow. As regards limitation, the period within which Ex.B-1 should have been questioned is 12 years from the date of its execution. That would take us to 1968. The present suit came to be filed only in 1976. There is also nothing to show that the joint family continued even after Ex.B-1, or that anybody, other than the first defendant and the possible exception of PW.5, had anything to do with the joint family properties. Within a week from the date of Ex.B-1, the first defendant began exercising absolute rights of ownership by creating a mortgage under Ex.B-11. Exhibits B.12 and B.13 show that there were claims against the quondam joint family and that they were taken care of by the first defendant. Ex.B-14 dated 30.05.1962 is a receipt issued by Ranga Reddiar to the first defendant apparently evidencing repayment of joint family debt. This is followed by sale deeds originals of Exs.A.9 to A.11 in 1961, 1962 and 1964. The first defendant has dealt with the properties as absolute owner. Counsel's argument that there was no disruption of joint family and therefore Article 110 of the Limitation Act will alone apply cannot be accepted. There has been total exclusion of the second defendant and his sons, the plaintiffs and the third defendant. The exclusion was known to the second defendant from day one. His knowledge was

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knowledge of his then minor sons also. There is also authority for the position that you can impute knowledge to the minor and it can be availed of as being knowledge even before majority for it is not as if law prohibits recognition of the knowledge of any person during his minority. Only thing is, his incapacity to take actin immediately is recognised and he is shown concession in the matter of time for taking action. The Privy Council in Kalyandappa vs. Chambasappa (AIR 1924 PC 137) has endorsed this view in the following manner.

> "The view that you cannot impute knowledge to a minor is certainly not in accordance with the facts of human nature."

Be that as it may, the first plaintiff was 11 years old in 1956. He must have attained majority in 1963. The suit ought to have been filed in 1975. The suit filed in 1976 is clearly barred by limitation. "

39. On the pleadings, it is also seen that it is not the case of the plaintiff that 1959 partition deed marked as Ex.A-1 is vitiated by fraud or misrepresentation or by any other factors or the first defendant was having any ill motive against him. On the other hand, it is the case of the plaintiff that even though Ex.A1 document was executed in the year 1959, the same was not acted upon. For the purpose of deciding about limitation, the question to be considered is about the knowledge attributable to the plaintiff who was minor at the time of execution of Ex.A1 and attained majority in the year 1966. On the above said facts and evidence which I have narrated above, especially when the facts are not in much dispute, I have re-settled the issues by framing the following issue:

> "Whether the suit for partition filed by the plaintiff after the period of limitation enunciated under Section 3 read with Sections 6 and 8 and Article 110 of the Limitation Act is maintainable ?"

40. On the above said issue which I have resettled, for the reasons stated above, I am of the considered view that instead of referring the matter to the trial Court once again, I proceed to answer the same as per Order 41, Rule 24 C.P.C.

41. In these circumstances, the contention raised by the learned senior counsel appearing for the 1st respondent/plaintiff that for application of Article 110, it must be proved that it is joint family property and that a person who claims a share must be excluded from claiming any right from the joint family property and

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the exclusion should be made known to the party and 12 years has to be lapsed only from the date of such knowledge, has to be considered. On the facts of this case, it is clear that the plaintiff was aware of Ex.A1 partition deed and the plaintiff who claims to be a member of joint family from which he was totally excluded and therefore, there is no difficulty to come to the conclusion that after the lapse of 12 years he loses his right. As I have stated earlier, it is not even his pleading that the 1st defendant, his father has committed fraud in excluding the plaintiff from the joint family property. On the other hand, as per the legal dictum, the 1st defendant being the father and guardian was certainly entitled to act on behalf of the plaintiff and inasmuch as such act of the 1st defendant was not questioned by the plaintiff, based on the Ex.A1 partition deed, there is absolutely no difficulty to come to the conclusion that the suit is barred by limitation.

42. Point No.2: Even assuming that the knowledge of the plaintiff about Ex.A1 is proved to have occurred only at the time of filing of the suit, which fact as I have stated earlier is not in issue in this case, the next point in this case to be considered is as to whether the plaintiff has proved that the partition effected in 1959 under Ex.A1 has not been acted upon. In this regard, the law is well settled that the presumption is that the family is joint in nature and the presumption is not that joint family owns properties, which is a matter for proof. Therefore, mere possession of properties by the elder member of the family does not lead to a presumption that they are joint family properties. It is for the person who alleges that all subsequent purchases were made out of the nucleus available in the hands of the Kartha to plead and prove that the nucleus in the hands of the kartha was such of substantial nature in yielding income leaving surplus in the hands of Kartha which would have been utilised for the subsequent acquisitions, and therefore, the substantial and adequate nucleus in the hands of Kartha must be pleaded and proved and it is only after such pleading and proving is effected the onus is shifted onto the Kartha to prove that no funds is utilised for the acquisition. That was the judgment rendered by the Division bench of this Court Ranganayaki Ammal ..vs.. V. Balakrishna Naidu (1978 (1) MLJ 56) and the same is followed by R.BALASUBRAMANIAN,J., in Ranganayaki Ammal ..vs.. V.Balakrishna Naidu (2002 (3) L.W.809).

43. It is the case of the plaintiff that in 1955 family arrangement there was a division between the families of Chinniah Thevar and Kutty Thevar and subsequently in the year 1959 under Ex.A1 the family arrangement got materialised into a registered written partition. According to the plaintiff, the said partition was entered for splitting up of the properties and giving the same to the defendants 1 to 3 for land ceiling purposes. In other words, according to the plaintiff, the said 1959 partition in so far as it

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relates to the family of Chinniah Thevar which included the 1st defendant Ramanathan Thevar and his brother Karuppiah Thevar who was examined as P.W.5, was effected only for the purpose of land ceiling and Ex.A1 was not given effect to.

44. On the other hand, it is admitted by the plaintiff himself that under Ex.A.1 the share given to Kutty Thevar has been acted upon. In fact, the share allotted to the brother of the first defendant, viz., Karuppaiah Thevar, who was examined as PW.5 itself is admitted to have been given to him and his legal heirs and therefore, the plaintiff's contention that the properties allotted to the first defendant's father Chinnaiah Thevar in which defendants 1 to 3 were given shares were divided for land ceiling purposes is, on the face of it, not only contradictory, but also unacceptable.

45. Even assuming that in Ex.A.44 Power of Attorney dated 25.11.1946, which was given by Chinnaiah Thevar to his brother Kutty Thevar, the said Chinnaiah Thevar has stated that they constituted a Hindu undivided family and Chinnaiah Thevar being the elder member was managing the properties, by virtue of Ex.A.1 partition entered on 21.10.1959, by which admittedly, Kutty Thevar's share was given to his family members, and the first defendant and Karuppiah Thevar were also given shares, the joint family status between Chinniah Thevar and Kutty Thevar has come to an end. Therefore, if the case of the plaintiff is that after such categorical position, the first defendant along with defendants 2 and 3 and plaintiff have joined among themselves as a joint family, it is the onus on the part of the plaintiff to prove that in spite of the same the joint family status among them continued. In such circumstances, the finding by the learned Judge that the joint family status between the plaintiff and defendants 1 to 3 has continued based on the power of attorney executed by Kutty Thevar in favour of his brother Chinnaiah Thevar on 25.11.1946 marked as Ex.A.44, which is much before the partition deed marked as Ex.A.1 dated 21.10.1959 is not sustainable. The assumption by the learned Judge that it is the case of the plaintiff that 1959 partition deed is not true and the same has not been given effect to is not even pleaded by the plaintiff. On the other hand, the specific pleading of the plaintiff is that, "the division was only between first defendant and his brother (Karuppaiah Thevar) and Kutty Thevar's Branch". It is also the specific pleading of the plaintiff that, "plaintiff and defendants 1 to 3 continued to be members of the Hindu co-parcenery." Therefore, it is not even the case of the plaintiff that 1959 partition is not true and not acted upon. In such circumstances, when it is the specific case of the plaintiff that the joint family continues between defendants 1 to 3 and the plaintiff, a legal obligation is cast on the plaintiff to plead and prove that there existed a joint family. It is unfortunate that to come to the conclusion that there was no division in the joint family, the learned trial Judge has not only

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relied upon Ex.A.44 which was much before Ex.A.1 partition deed in 1959, but also Ex.A.81, which is a voter's list. A reference to the deposition of PW.1 shows that there is absolutely no evidence that after the partition deed defendants 1 to 3 and the plaintiff have been living as a joint family. This is apart from the fact that the plaintiff has not given any reason as to how the joint family continues, in spite of the fact that under Ex.A1, defendants 1 to 3 have been given separate properties especially when it is admitted that the properties have been divided in respect of other joint owners and they have been enjoying the properties as per the division.

46. It is admitted that the plaintiff has executed a registered power of attorney in favour of his father 1st defendant on 10.04.1972 marked as Ex.A.82. Eventhough the plaintiff as P.W1 would say,

> "1வது பிரதிவாதி பொதுக் குடும்பத்தை பார்த்துக் கொள்வதற்கு ஆக தான் நான் பவர் எழுதி கொடுத்தேன். நான் out of station-ல் இருப்பதால் அந்த பவரை வைத்து தான் 1ம் பிரதிவாதி அந்த பொதுக் குடும்ப சொத்தை டீல் பண்ண முடியும் அதனால் பவர் எழுதி கொடுத்தேன்.ஞ,

a reference to Ex.A.82 specifically states the reason for executing the power of attorney as follows:

> "நான் வெளியூரில் வேலையில் இருந்து வருகிறேன். அதனால் நான் என் குடும்ப சம்மந்தமான எந்த வேலைகளையும் சொத்துக்களையும் கவனிக்க முடியவில்லை. ஆதலால் நம் குடும்ப விஷயமாய் சகல சொத்துக்களையும் தாங்களே எனக்காக பாதுகாத்து பராமரித்து வரவும் வாரம் குத்தகைகளை வசூல் செய்யவும் எங்களுக்குள்ள எல்லாவித சொத்துக்களுக்கு எல்லாவித தஸ்தாவேஜுகள் எழுதி அதில் எனக்காக தாங்களே கையெழுத்து செய்து ..... "

In the said power, the plaintiff has nowhere stated that there has been any existence of joint family consisting of the plaintiff and the 1st defendant, and it is only to manage the property he has authorised the 1st defendant.

47. It is seen that under Ex.A8 document filed by the plaintiff the 2nd defendant and the 7th defendant who is none else than the son of Karuppaiah Thevar (brother of 1st defendant) who has given evidence for the plaintiff as P.W.5, have entered a registered deed of exchange dated 27.6.1965. Likewise, under Ex.A9 registered deed of exchange dt.27.6.1965, the 1st defendant and his brother Karuppaiah Thevar have exchanged the properties among themselves. The plaintiff in the evidence specifically admits that the said exchange between the 2nd defendant and 7th defendant entered in 1965 was entered based on the partition deed dt.21.10.1959 and as per the

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exchange, the properties have been transferred to the concerned parties, namely, 2nd defendant and 7th defendant respectively. The evidence in this regard by the plaintiff is as follows:

> "2ம் பிரதிவாதி, 7ம் பிரதிவாதி 1965ல் பாிவாத்தனை செய்து கொண்டார்கள். பாிவாத்தனைப்படி அவரவர்களுக்கு சொத்து போய்விட்டது, 1959 பாகப்பத்திரத்தின் அடிப்படையில் தான் பாிவாத்தனை செய்யப்பட்டது, "

48. While so, the father of the 7th defendant, namely, karuppaiah Thevar-P.W.5, who is none else than the brother of the 1st defendant, has chosen to state as if the partition under Ex.A1 between him and 1st defendant apart from Kutty Thevar was not effected among the 1st defendant and his children, which is quite improbable and stated with some motive. In respect of one of the properties received under Ex.A1 partition deed, the 7th defendant has exchanged the same with the 2nd defendant, who is the son of the 1st defendant and hence, it is not understandable as to how P.W.5 can now say as if the 1st defendant and his children have not received the properties.

49. P.W.5 in his evidence, while deposing about Ex.A8, has chosen to state as follows:

> "பிசா.7 என் மகன் அவர் மைனராக இருந்த சமயம் நானும் ராமமூர்த்தியம் வா.சா.ஆ.8 எழுதிக்கொடுத்தோம். அதில் குடும்ப சொத்து என்று எழுதவில்லை தனி சொத்து என்று எழுதப்பட்டிருக்கிறது. வா.சா.ஆ.9 மூலம் பாிவாத்தனை செய்து கொண்டோம். அதில் என் பிள்ளைகளை காட்டி எழுதிவல்லை. "

On the other hand, a reference to Ex.A8 clearly shows that the properties were obtained by the parties under the registered deed of partition dated 21.10.1959 the contents of the said document are as follows:

> "1959ம் தேதி அக்டோபர் மாதம் 21ந்தேதி டை பாக பத்திரம் எழுதப்பட்டு டை பாக பத்திரம் கீரமங்கலம் சப் ரிஜிஸ்ட்டர் ஆபீசில் 1960ம் இந்திய 1வது புஸ்தகம் 4வது வால்யூம் 373 டு 424 பக்கங்களில் 1960ம் இந்திய 1ம் நம்பர் தஸ்தாவேஜியாக ரெஜிஸ்ட்டராகி அந்தப்பத்திரப்படி சிஎடிஎஸ்ஸில் கண்ட சொத்துக்கள் 1வது நபருக்குக் கிடைத்து டை 1வது நபர் ராமமூர்த்தி அனுபோகத்தில் உள்ள இதனடியில் விவரிக்கப்பட்டிருக்கும் ஏ.எடிஎஸ்ஸில் கண்ட சொத்துக்களை நம்மில் 2 நபர் மைனர் மனோகரன் கார்டியன் கருப்பய்யா தேவர் பாிவாத்தனையாக அடைந்து கொண்டும் …."

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Therefore, it is clear that the partition Ex.A1 was in fact acted upon, as admitted by P.W.5 and as found in the documents Exs.A8 and A9. It is in this context, the contention of the learned senior counsel for the appellants that P.W.5 is responsible for kindling the dispute in the family cannot be slightly brushed aside. The said contention is fortified by the evidence of P.W.5, who states,

> "முதல் பிரதிவாதியின் மனைவி பிள்ளைகள் இந்தியாவில் இருந்தார்கள். அவர்கள் தான் பார்த்துக் கொண்டார்கள் என்று கூறவது சரியில்லை. அதற்கு கணக்கு இல்லை. வாய்தா கட்டினேன். முதல் பிரதிவாதிக்கு ஒதுக்கப்பட்ட சொத்துச விபரம் தெரியும். தாவாவிற்கு விபரம் நான் தான் கொடுத்தேன்."

50. In this background the evidence let in on the side of the plaintiff, namely, P.W.2 one of the panchayatdars is to be seen. He has clearly stated that he does not even know about the partition between first defendant and his brother Karuppiah Thevar. His evidence is,

> "1ம் பிரதிவாதி மற்றும் அவர் தம்பிக்கு பாகம் ஆனது எனக்கு தெரியாது. 1ம் பிரதிவாதி குடும்பத்தில் பாகமாகிவிட்டது என்று சொன்னார்கள்."

Likewise, the evidence of P.W.3, who was allegedly having some dispute with the 1st defendant is also not credible. However, he has admitted that the 2nd defendant was doing agricultural operations. Similarly, the evidence of P.W.4 who is admitted to be the father-in-law of the 3rd defendant cannot be relied upon. He specifically admits in the cross examination that the 3rd defendant is his son-in-law and he has married his daughter. Inasmuch as the 3rd defendant joins with plaintiff in claiming a share, his evidence cannot be treated as independent in nature.

51. A reference to the contents of Ex.A-1 which clearly confers the property to the first defendant, the second defendant and third defendant demarcating the same in the form of schedules and stating that the respective properties should be received by the concerned defendants shows that the evidence of P.W.5 that the purport of execution of Ex.A-1 was only to effect partition in the family of Chinnaiah Thever between the first defendant and P.W.5 and there is no provision in the said document about the properties given to the 1st defendant and his children is a total false statement. It is further relevant to note that even Ex.A-6 partition deed between the first defendant and the said P.W.5 Karuppaiah Thevar, also contains the recitals about the execution of Ex.A-1 specifically stating that the properties which were partitioned under Ex.A-6 were enjoyed in common and other properties were divided. Further, even Ex.B-1

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release deed dated 27.6.1965 executed by the said P.W.5 Karuppaiah Thevar in favour of the first defendant shows that as per the family arrangement of 1955, joint family properties have been divided and those who have been allotted shares are enjoying the properties independently. All these factors go to show not only the factum of division of properties as per Ex.A-1 between the defendants 1, 2 and 3 but also the conduct of P.W.5 who has chosen to give evidence even against the contents of the document.

52. P.W.4 Marimuthu is admitted to be the brother-in-law of P.W.5 and it is stated that P.W.5's sister's daughter was married to the plaintiff. All these things show as to how the plaintiff, P.Ws.5, 4 and 3 are closely related to each other. It is also seen under Exs.A-3, 4 and 5 sale deeds dated 29.9.1959, 5.1.1960 and 29.9.1959 respectively that all the documents are standing in the name of first defendant as purchaser. Further, Exs.B-54 and B-55 which are the passport endorsement of the first defendant also show that in the period between 1950 and 1958 and also 1958 and 1962, the first defendant was having sufficient amount of Rs.13,638/- and Rs.26,845.25 which he has brought to India as it is seen in the endorsement in the passport. It is also seen that even in the name of the third defendant's wife Janaki a property has been purchased on 24.7.1984 under Ex.B-109.

53. It is also relevant to point out that the 7th defendant, who has obtained property by the exchange from the 2nd defendant under Ex.A8 dt.27.6.1965 has in fact sold the property under Ex.B112 on 11.11.1981 which clearly acknowledges the exchange deed entered between him and the 2nd defendant. Similarly, in view of the clear contents of the document under Ex.A8, the pleading in the plaint that Ex.A1 partition was executed only for the limited purpose of giving the properties to the 1st defendant's family is not acceptable.

54. Therefore, the evidence on the side of the plaintiff is clear to show that Ex.A1 partition deed has been acted upon between the 1st defendant and his brother Karuppaiah Thevar as well as his father's brother Kutty Thevar, besides the 1st defendant and defendants 2 and 3. In such circumstances, the finding of the learned trial Judge that the partition deed Ex.A1 was not acted upon has absolutely no basis. Therefore, I have absolutely no doubt in my mind that after Ex.A1 partition deed dt.21.10.1959, the partition has been given effect to between defendants 1 to 3 just as effected between 1st defendant and his brother Karuppiah Thevar and his father's brother Kutty Thevar, and the findings by the learned trial Judge is clearly perverse. In such background, the properties acquired by the 1st defendant as well as 2nd defendant in their respective names and the sales effected by the 1st defendant cannot be held to be effected on behalf of the joint family. It is

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therefore clear that the plaintiff was excluded in Ex.A1 partition deed by his guardian 1st defendant and that exclusion was known to the plaintiff after he became major in 1966 and in such circumstances, the present suit for partition without taking steps to set aside the said partition deed dt.21.10.1959 marked as Ex.A1 is not maintainable. Likewise, the 3rd defendant, who has consciously taken a share under Ex.A1 partition deed cannot be expected to raise his plea of partition without assailing the Ex.A1 partition deed.

55. Further, on the entire factual situation, one can easily assess that there is no evidence or proof of joint family between the plaintiff and the defendants 1 to 3 and that they are owning properties jointly. As held by this Court in Parsam Venkataramayya vs. Parsam Venkataramappa (1953 (1) MLJ 508),

> "It is well settled that there is no presumption that a business carried on by a member of a joint Hindu family is joint family business and it is for those who set it up to establish it that though the business was carried on by an individual member, it was the business of the family".

In the absence of any evidence in this case, it can never be said that any joint family is in existence between the plaintiff and the defendants 1 to 3. As far as the right of the father, viz., 1st defendant to have a partition, he certainly had a right to enter into partition whether the children are minors or majors and without their consent as it is not the case of the plaintiff that there is any fraud or any vitiating factor has been effected by the first defendant in depriving the right of the plaintiff to have a share.

56. I do not think that the plaintiff has got any right of partition even assuming that the first defendant with certain fraudulent intention has deprived the plaintiff of his share while giving shares to other sons viz., defendants 2 and 3. The partition viz., Ex.A-1 can only be treated as voidable which can be set aside at the option of one of the joint owners viz., the plaintiff herein, but the plaintiff has not exercised his option to declare such a partition deed as not enforceable. Hence, the document is presumed to be valid in law. The fact remains that though the said document is treated as voidable, the option is with the affected party to challenge the same within a reasonable time and if such exercise is not effected within the reasonable time, the validity of such document continues to remain for ever. In M.S.M.M. Meyyappa Chettiar vs. Commissioner of Income Tax, Madras (1950(2) MLJ 353), this Court has held as follows:

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"Under the Mithakshara law the father has the undoubted right and privilege of effecting a partition between himself and his sons, whether they are majors or minors, without their consent. He may divide the properties physically or may only bring about a division in status. This division may be between himself and his sons or even between sons inter se. The partition so made however must be fair and equal"

" If the partition is unequal and unfair it is open to the sons if they are majors, to repudiate the partition; but if they are minors, it is open to them to avoid that partition by appropriate proceedings after they obtained majority. The partition therefore will be good until it is set aside.

"Whether it is an alienation under the Hindu Law by a guardian on behalf of the minor or a partition effected by the father in the exercise of his peculiar power the transaction will be good until it is set aside; it is voidable and not void. "

57. Further, the father's right of entering into partition is reiterated in Venkata Subramania v. Easwara Iyer AIR 1966 Madras 266, in the following words:

"The power of the father of a joint family to divide family property at any moment during his life, provided he gives his sons equal share with himself, is well established. The consent of the sons is not necessary for the exercise of that power, the right of the father to serve himself and the sons inter se being part of the patriae potestas that was recognised by the Hindu Law. "

"The power of a father to effect division is subject to the distribution being equal. If the distribution effected by the father is unequal or there has been fraud in the division and it is vitiated by undue favouritism, the partition, effected would be reopened and adjusted. But the partition is not wholly void. "

58. The said decision was approved by the Supreme Court in Apoorva Shantilal Shah, HUF vs. Commissioner of Income Tax, Gujarat-1, Ahmedabad (1983 (2) SCC 155) holding that the father as a patriae potestas is entitled to effect partition in the following words:

" It is recognised in ancient Hindu Law that in a joint family governed by Mitakshara School, father in exercise of his superior right has father or of his

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rights as patria potestas is entitled to bring about a complete disruption of the joint family consisting of himself and his minor sons and to effect a complete partition of the joint family properties even against the will of the minor sons."

59. Even assuming that some fraud has been played by the 1st defendant in the execution of Ex.A-1, it was always open to the plaintiff to have the document set aside within the period of limitation immediately after he had become major, which has not exercised especially on the facts and circumstances which I have narrated earlier that there are abundant evidence to show that he had knowledge about the partition even from the beginning. The right of the son on attaining majority to have the partition set aside has been confirmed by this Court in M.S.M.M. Meyyappa Chettiar vs. Commissioner of Income Tax, Madras (1950 (2) MLJ 353) as follows:

" If the sons happened to be minors at the time of partition, they can have the partition set aside on their attaining majority. But it is equally open to the sons to acquiesce in and accept the transaction (See 25 MLJ 188 and ILR 29 All 37). In other words, the transaction is not void but only voidable, at the option of the sons and if the later seeks to stand by it or enforce its terms, it will not be open to the father to plead any invalidity of the arrangement on the ground of the inequality of the allotments."

60. Therefore, I have no hesitation to come to the conclusion that the plaintiff and the 3rd defendant cannot claim to be the members of joint family with the 1st and 2nd defendants. The law is well settled about the Hindu father to effect partition without the consent of his minor sons, even in respect of the ancestral property and such partition is binding upon the sons and it is only for the sons, who allege that the partition is unfair, to set aside the same in the manner known to law. Therefore, the suit filed for partition without declaration regarding the partition deed dt.21.10.1959 marked as Ex.A1 is clearly not maintainable. Therefore looking at any angle I am of the considered view that the learned Judge has committed a substantial error in granting decree for partition, on the basis that the joint family status between the defendants 1, 2 & 3 and the plaintiff continues and for the reasons stated above, the appeals are to be allowed.

61. The next point to be decided is about the basis for the findings of the trial Court submitted pursuant to the order of this Court in C.M.P.No.11380 of 1995 in A.S.No.768 of 1985. As I have stated above, pending the above appeals, the appellant in A.S.No.768

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of 1985 died and the appellant in A.S.No.974 of 1986 who is the second defendant in the suit by relying upon the registered Will dated 2.9.1985 executed by his father, first defendant in the suit, would claim that he is entitled to inherit the estate of the first defendant in the suit. Likewise, the 4th defendant in the suit who is the daughter of the deceased first defendant has also relied upon a will said to have been executed by the first defendant on 24.3.1995 claiming to inherit the estate of the first defendant. Therefore, the object of referring the matter to the trial Court was to the limited extent of finding about the genuineness of the will relied upon by the second defendant dated 2.9.1985 and the will relied upon by the 4th defendant dated 24.3.1985. The trial Court has taken the said application in I.A.No.460 of 1985 in O.S.No.20 of 1982 and conducted an enquiry. In the said enquiry, the 2nd defendant who was the petitioner in C.M.P.No.11380 of 2000 in A.S.No.768 of 1985 was examined as P.W.1 along with one Marimuthu as P.W.2 being the attesting witnesses of the will dated 2.9.1985 executed by the 1st defendant. The said will in I.A. enquiry was marked as Ex.A-1. That apart 11 other documents were filed on behalf of the 2nd defendant and marked as Exs.A-2 to A-12. Likewise, the plaintiff in the suit was examined as R.W.1 and the 4th defendant who has relied upon the will said to have been executed by her father dated 24.3.1995 was examined as R.W.4 and the said will was marked as Ex.B.4.

62. One Adaikalam and Thiruvengadam who were the attesting witnesses of Ex.B-4 will were examined as R.Ws.7 and 8. Apart from those witnesses, four more witnesses were examined as R.Ws.2 to 5 and documents Exs.B-1 to B-12 were marked. The trial Court has allowed the parties to file affidavits to substantiate their respective claims and formulated the following point for determination:

> "Whether the will, Ex.A-1 dated 2.9.1985 produced by the petitioner Ramamurthi is true and valid and or the will Ex.B-4 dated 24.3.1995 produced by the 3rd respondent Janaki is true and valid?"

The will marked as Ex.A-1 dated 2.9.1985 is a registered one and marked through the second defendant in the suit as P.W.1 in I.A. and one of the attesting witnesses was examined as P.W.2 to prove the signature of his father in Ex.A-1. The petitioner in I.A. has filed various letters written by the first defendant marked as Exs.A-4 to A-11. The Court has also taken into consideration the signature of the first defendant in the suit in a post card written by him and marked by the other side as Ex.B-12. The plaintiff in the suit was examined as R.W.1 in the I.A. His case was that the said Will was obtained by undue influence, duress and coercion. The trial Court has found that after executing the will marked as Ex.A-1, the first defendant testator has lived hale and healthy for another 10 years

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and if really duress and coercion were exercised by the second defendant, he would have certainly cancelled the same since it is admitted by the other side also that the first defendant was a strong willed man. The trial Court has taken into consideration the evidence of P.W.1, attesting witness and has come to the conclusion that the will Ex.A-1 has been proved in compliance of section 68 of the Indian Evidence Act coupled with section 63(c) of the Indian Succession Act. It is stated by the trial Court that P.W.2 has clearly given evidence that he has attested Ex.A-1 and he has seen Ramanatha Thevar signing Ex.A-1 and Ramanatha Thevar had seen the witnesses attesting Ex.A-1. It is also found that the said P.W.2 was identifying as witness before the Sub Registrar also. It is also found that in fact Ramanatha Thevar wanted to settle the issues amicably as per the evidence of P.Ws.3 to 5 and also based on Exs.B2 and B-3 but the move for compromise has not come into effect and as admitted by the 4th defendant in the suit who was examined as R.W.6 Janaki, "the sons of Ramanatha Thevar did not agree for the compromise". Therefore the Court has also found that Exs.B-2 and B-3 stated to be agreement and partition dated 27.5.1993 and 28.5.1993 respectively were never acted upon and such agreement has never taken place.

63. The learned trial Judge has also gone into the contents of Ex.A-1 will and found that the said Ex.A-1 dated 2.9.1985 will is genuine, true and valid. On the other hand, while considering the will produced by the 4th defendant dated 24.3.1995, marked as Ex.B-4, one of the attesting witnesses signed the said Ex.B-4, was examined as R.W.6. Thiruvenkadam is stated to be the husband of the 4th defendant Janaki who was examined as R.W.6 and who claimed right under the said will. The said will dated 24.3.1995 was said to have been executed by Ramanatha Thevar at Madras. Ex.B-4 also contains a clause cancelling the will dated 2.9.1985 marked as Ex.A-1. The trial Court after considering the evidence, has found that the said will Ex.B-4 is not true, genuine and valid. The trial Court has also given reason that admittedly P.W.1 and P.W.6 viz., the plaintiff and the 4th defendant respectively in the suit have stated that Ramanatha Thevar was in the habit of writing diary and used to enter all important events in the said diary and that was marked as Ex.B-5 which according to R.W.6 was left by her father when he came to see her at Madras along with a bag containing Exs.B5 to B-11. The trial Court found that while it is the specific case of R.W.6 and R.W.1 that their father Ramanatha Thevar entered everything in his diary and Ex.B-5 was produced before the Court, the diary does not contain anything about the execution of Ex.B-4 at all. On the other hand, the diary contains the minute details as to when Ramanatha Thevar left for Madurai via Pudukkottai on 19.3.1995 and on 23.5.1995 he returned and he left Madras for home on 8.45 p.m. On the other hand, about the important event of executing will on 24.3.1995 he has not written anything in the

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said diary Ex.B-5. That apart, the trial Court also found that it is the admitted case of R.W.6 that on the Tenth Day ceremony of her father she told about the will executed by her father dated 24.3.1995 to all relatives and therefore everyone was aware of the same since she demanded her share as per the will. However, it was thereafter, the second defendant filed the transpose petition in the appeal filed by the first defendant before this Court in A.S.No.768 of 1985 and to that petition, the plaintiff in the suit who was the first respondent in the appeal has filed a counter which was marked as Ex.A-12 and there is nothing about the will dated 24.3.1995. The trial Court has also disbelieved the evidence of R.W.7, one of the attesting witnesses and also R.W.8 based on the evidence in cross-examination. In fact, in respect of R.W.8, the trial Court has come to the conclusion that no evidence is available to show that he was in Madras on the said date, viz., 24.3.1995. The trial Court, in my considered view, has correctly come to the conclusion that if really Ramanatha Thevar has executed the will in favour of the 4th defendant on 24.3.1995, he would have certainly contacted his advocate at Madras to see that the appeal filed by him in A.S.No.768 of 1985 is withdrawn. That apart, the trial Court has found that Ex.B-4 will is not a registered document and on a totality of the situation and on assessment of evidence, has come to the conclusion that the will produced by the 4th defendant marked as Ex.B-4 dated 24.3.1995 is not true, genuine and valid.

64. Even though objections are filed by the respondents to the said finding on the basis that Ex.B-4 will was proved by the evidence of two attesting witnesses, but to prove Ex.A-1 will only one attesting witness was examined as P.W.2, the law in this regard is well settled. As per Section 63(c) of the Indian Succession Act read with Section 68 of the Indian Evidence Act, to prove a will, it is enough to examine at least one of the attesting witnesses and there is no necessity that both the attesting witnesses should be examined. That was the decision rendered by the Division Bench of this Court in M.S.P. Rajesh vs. M.S.p. Raja (1994(1) MLJ 216). Hon'ble Mr.Justice M.Srinivasan (as He then was) and Hon'ble Mr.Justice Thangamani in the abovesaid judgment, while explaining the requirement of proving a will as per the Evidence Act and Succession Act, have held as follows:

> "17. In this connection, it is necessary to refer to Sec.63 (c) of the Succession Act which runs as under:
>
> "The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign, the Will in the presence and by the direction of the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign

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the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form or attestation shall be necessary."

Sec.68 of the Evidence Act, 1872 provides that if a document is required by law to be attested it shall not be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. This section lays down the mode of proof of a will by calling atleast one witness, but it does not set out or purport to define what is required to be proved. That however has been laid down in Sec.63(c) of the Succession Act. Even if one witness, who is called, is able to depose to all that is required by Sec.63 (c) of the Succession Act, for the valid execution of a Will, that would suffice for Sec.68 of the Evidence Act. Sec.68 of the Evidence Act does not in any manner change or alter the requirements to be proved by Sec.63(c) of the Succession Act. A reading of Sec.63(c) of the Succession Act with Sec.68 of the Evidence Act, establishes that a person propounding a Will has to prove that the Will was duly and validly executed and that should be done by not merely establishing that the signature on the Will was that of the testator, but also that the attestations were made in the manner contemplated by Clause (C) of Sec.63 of the Succession Act. It is not necessary under Sec.68 of the Evidence Act, to examine both in all the attesting witnesses. There is no dispute that Advocate Thangamani, the other attestor to Ex.B-16 had died on 16.10.1981. And in our view the disinterested testimony of D.W.2 Rajaraman amply satisfies the requirements of law referred to above."

65. In fact, the Supreme Court has held that when only one person was examined who himself was the scribe to prove the will, even though there were three attesting witnesses, it cannot be stated that the will is not proved for non-examination of other two witnesses. That was the decision in Palanivelayutham Pillai vs. Ramachandran(2000(6) SCC 151) in the following words:

"9. ... It must, therefore, be held that the disputed will was attested by three attesting witnesses out of which one Sankara Narayanan was examined in the trial court for proving the said will. The trial court as well as the High Court were justified in taking the view that the will

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(Ex.B-487) was duly executed. "

66. In view of the abovesaid facts, the appeals stand allowed with cost to the appellant in A.S.No.974 of 1986 and the judgement and decree of the trial Court are set aside. As per the Will dated 02.09.1985 produced by the appellant in A.S.No.974 of 1986, viz., R.Ramamoorthi, who was also transposed as appellant in A.S.No.768 of 1985, is entitled to inherit the estate of the first defendant in the suit. Connected miscellaneous Petitions are closed.

Kh

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge, Pattukottai.

2. The Section Officer,
VR Section, High Court,
Madras.

+ 1 cc to Mr. R. Seetharaman, Party in Person, SR No. 50292

+ 2 ccs to Mr. S. Sundaresan, Advocate SR No. 50196, 50197

+ 2 ccs to Mr. J. Srinivasamohan, Advocate SR No. 50648, 50649

Common Judgement
in
A.S.Nos.768/85 and 974/86

MDR(CO)
SR/14.9.2007

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